

Issue: Group II Written Notice with Suspension (unsatisfactory performance); Hearing Date: 01/12/17; Decision Issued: 01/19/17; Agency: ODU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10910; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10910

Hearing Date: January 12, 2017
Decision Issued: January 19, 2017

PROCEDURAL HISTORY

On July 14, 2016, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for unsatisfactory performance.

Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On November 21, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 12, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Old Dominion University employs Grievant as a Police Officer. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was working in uniform on May 20, 2016. He was wearing a belt holding his .40 Cal Glock duty weapon. He went to the Building to use the restroom. He went to a restroom in the Building which was locked and not accessible to the public. Only Agency employees with a master key could enter the restroom. Once inside the restroom, he entered a stall secured with a stainless steel side lock. Grievant removed his weapon from its holster and placed it on the back of the toilet. When Grievant left the restroom, he locked the main restroom door but failed to retrieve his firearm from the restroom. He went to another Police building and completed administrative duties.

Another employee with a master key entered the restroom and observed Grievant's weapon. He notified the Agency's Police Department staff and a radio call was made notifying Police Officers that a weapon had been found in the restroom. Grievant heard the radio call and realized it was his weapon that had been found. He recovered his weapon and informed his supervisor what had happened. Grievant had been without his weapon for approximately one hour and 15 minutes.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal

disciplinary action.”¹ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Agency Police Department Policy 1:6 governs Uniform Standards of Conduct. Section 11 provides:

The department issues certain articles of equipment and uniforms to various employees and it is the responsibility of those employees to care for and properly maintain assigned equipment.²

Police Department Directive 1005 governs Firearms. Section V(D) provides:

It is the responsibility of those sworn officers who are assigned a department issued firearm to properly care for and safely secure the firearm both on duty and off duty.³

Failure to follow policy is a Group II offense.⁴ On May 20, 2016, Grievant left his duty weapon in a restroom for over an hour. He failed to properly maintain his assigned equipment. Grievant was without his weapon for over an hour. If he had been required to respond to an emergency, he may have placed himself or other Agency employees in danger because he was without his weapon. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten work days. Accordingly, Grievant’s five workday suspension must be upheld.

Grievant argued that the matter could be addressed with a lesser level of discipline. Although Grievant is correct that a lesser level of discipline could have been used to address his behavior, once the Agency has met its burden of proof to show a Group II offense, the Hearing Officer may not reduce that level of discipline unless mitigating circumstances exist.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² Agency Exhibit 7.

³ Agency Exhibit 7.

⁴ See, Attachment A, DHRM Policy 1.60. The Agency failed to correctly style the written notice (unsatisfactory performance instead of failure to follow policy) but presented sufficient evidence to show that Grievant knew or should have known his behavior was contrary to policy. Behavior that is contrary to policy is also unsatisfactory performance.

Management”⁵ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated because the Agency inconsistently applied disciplinary action. The evidence showed that one officer had his weapon stolen in 2006 and received a Written Notice with a week suspension. Officer D left a rifle locked in a case inside a Police truck but did not receive disciplinary action. It is unclear whether Agency managers learned of Officer D’s behavior. Officer G was in the Police Department offices and he checked out a rifle. He received a call and left the room where rifles were stored and left the rifle by itself. Another officer watched the rifle until Officer G returned. It is unclear whether Agency managers learned of Officer D’s behavior. Officer G also left his handgun in the restroom of the Police Department. Grievant found the gun and told the officer in charge but it is not clear whether Agency managers learned of this behavior. The Hearing Officer cannot conclude that Grievant was singled out for disciplinary action by Agency managers when compared to other employees engaging in similar behavior. It is not clear that Agency managers knew of the behavior by other officers and elected to disregard that behavior. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with a five work day suspension is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director

⁵ Va. Code § 2.2-3005.

Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁶

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.